LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
DEC 15

No. 417

In the Supreme Court of the United States

OCTOBER TERM, 1948

BAXTER GRIFFIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Summary of argument	17
Argument:	
The District Court did not abuse its discretion in denying the motion for a new trial	19
Conclusion	27

CITATIONS

Cases:	
Aiken v. *State*, 176 Ga. 338	20
Andrews v. *United States*, 224 Fed. 418	19
Barber v. *United States*, 142 F. 2d 805, certiorari denied, 322 U. S. 741	19
Bridge v. *State*, 20 Ohio Cir. Ct. (N. S.) 231, affirmed, 87 Ohio St. 464	20
Carraway v. *State*, 167 Miss. 390	20
Commonwealth v. *Russogulo*, 263 Pa. 93	21
Deuran v. *State*, 134 Tex. Cr. 433	24
Evans v. *United States*, 122 F. 2d 461, certiorari denied, 314 U. S. 698	20
Flowers v. *State*, 27 Ariz. 70	20
Griffin v. *Clymmer*, 169 F. 2d 961	17
Griffin v. *United States*, 164 F. 2d 903, certiorari denied March 15, 1948, 333 U. S. 857	2
Helwig v. *United States*, 162 F. 2d 837	19
Holbrook v. *Commonwealth*, 165 Va. 700	21
Jeffords v. *Commonwealth*, 281 Ky. 568	20
Johnson v. *United States*, 32 F. 2d 127	20
Joyce v. *United States*, 294 Fed. 665, certiorari denied, 264 U. S. 592	19
Long v. *United States*, 139 F. 2d 652	19, 20
Luke v. *United States*, 84 F. 2d 714, certiorari denied, 299 U. S. 542	19
Mathews v. *State*, 111 Neb. 593	20
McKissack v. *State*, 61 Okla. Cr. 65	21
Miller v. *People*, 92 Colo. 481	20
Mitchell v. *United States*, 196 Fed. 874, certiorari denied, 226 U. S. 611	20
O'Pryor v. *State*, 237 Ala. 13	20

816380—48——1

Cases—Continued Page

People v. *Harrison*, 359 Ill. 295 ... 20
People v. *Prag*, 261 Mich. 686 ... 20
People v. *Priori*, 164 N. Y. 459 ... 20
People v. *Shepherd*, 14 Cal. App. 2d 513 ... 20
Prisament v. *United States*, 96 F. 2d 865 ... 20
Roberts v. *United States*, 137 F. 2d 412, certiorari denied, 320 U. S. 768 ... 19
Smith v. *State*, 117 Fla. 458 ... 20
State v. *Adams*, 181 Wash. 222 ... 21
State v. *Beckner*, 118 W. Va. 430 ... 21
State v. *Bergeson*, 203 Minn. 88 ... 20
State v. *Bradley*, 166 La. 1010 ... 20
State v. *Dodge*, 124 Me. 243 ... 20
State v. *Evans*, 98 Ore. 214 ... 21
State v. *Gangner*, 73 Mont. 187 ... 20
State v. *Hawkins*, 81 Utah 16 ... 21
State v. *Jella*, 132 Kans. 509 ... 20
State v. *Jennings*, 326 Mo. 1085 ... 20
State v. *Jones*, 185 S. C. 274 ... 21
State v. *Leper*, 36 S. D. 151 ... 21
State v. *Long*, 90 N. H. 163 ... 20
State v. *Pavey*, 193 Iowa 985 ... 20
State v. *Quintana*, 30 N. M. 348 ... 20
State v. *Reynolds*, 96 Vt. 37 ... 21
Sullivan v. *State*, 212 Ind. 79 ... 20
Wagner v. *United States*, 118 F. 2d 801, certiorari denied, 314 U. S. 622 ... 20
Weiss v. *United States*, 122 F. 2d 675, certiorari denied, 314 U. S. 687 ... 19, 20

Statute:

District of Columbia Code, 1940 ed., § 22–2404 ... 2

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 417

BAXTER GRIFFIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

Neither the District Court nor the Court of Appeals delivered a written opinion. The District Court's oral opinion appears at R. 115–116. The *per curiam* order of the Court of Appeals dismissing the appeal appears at R. 134.

JURISDICTION

The judgment of the Court of Appeals was entered June 16, 1948 (R. 134). The petition for a writ of certiorari was filed July 8, 1948, and was granted November 15, 1948 (R. 136). The jurisdiction of this Court rests on Section

240 (a) of the Judicial Code, as amended (now 28 U. S. C. 1254 (1)). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether, in the circumstances of this case, the District Court properly exercised its discretion in denying a motion for a new trial on the ground of newly discovered evidence.

STATEMENT

On March 28, 1947 (R. 2), following a jury trial in the District Court for the District of Columbia, petitioner was found guilty of murder in the first degree (R. 66), and on April 18, 1947 (R. 2), he was sentenced to the mandatory penalty of death by electrocution (D. C. Code, 1940 ed., § 22–2404). The conviction was affirmed on appeal, *Griffin* v. *United States*, 164 F. 2d 903 (C. A. D. C.), and this Court denied certiorari on March 15, 1948. 333 U. S. 857.

The present proceeding arose with the filing, on or about May 7, 1948, of a motion for a new trial on the ground of newly discovered evidence (see R. 67). In order, however, to understand the nature of the grounds urged in the motion, and to appraise the correctness of the order denying the motion, it is necessary to review the evidence for the Government and for the defense adduced at the original trial.

The Government's evidence at the trial may be summarized as follows:

Daisy McCullough testified that she and seven others, including petitioner and the deceased, Lee Hunter, attended a party at 1718 9th Street, N. W., Washington, D. C., on the evening of February 8, 1947 (R. 9–10, 14). She and petitioner and two of the others present started to play whist (R. 10). She said she was sure the game was whist, and not blackjack,[1] remarking that she did not know how to play blackjack (R. 12). After a while, they "stopped playing whist" and drank some whiskey and beer (R. 10). They "sat around and started talking" (R. 10). Then—

> * * * Baxter Griffin started playing with Lee Hunter's [the deceased's] baby. Lee Hunter told Baxter Griffin to put down the baby, because he had been drinking. Baxter Griffin said, "If you don't want me to play with your baby, I will take your wife and baby around to my house." Lee Hunter told him if he would do that, he would kick his teeth down his throat. Baxter Griffin got up, put on his overcoat, and said he was going home. He walks out the door and was gone about five or ten minutes. Then he comes back.

[1] The Court of Appeals, in its opinion affirming the conviction on the original appeal, stated that all the witnesses at the trial had testified that "a gambling game called 'blackjack'" had been in progress shortly before the fatal shooting (164 F. 2d 993). This, however, was clearly an inadvertent misstatement. The government witnesses testified that the game was whist (R. 10, 25, 28). Petitioner alone testified that the game was blackjack (R. 39).

There is a knock on the door. Lurline Bost opened the door. When she opened the door, she saw that it was Baxter Griffin. She turns to come back in the room. Just as she turned to come in the room, I heard a fire. I looked over in the corner and I saw Lee Hunter lying between the stove and the dresser.

Baxter Griffin said, "Ain't nobody going to say they are going to kick my teeth down my throat and get away with it." Then he looks over in the corner towards me and sees another boy. Henry Harritt was over there. And he turned the gun over there and fired over there.

By that time Henry Harritt had pushed me over in front of the door, and Esther [Taylor] was sitting on the sofa in front of the door and asked Baxter Griffin, "Please let me out with the baby," and "Don't hurt the baby." He told her to be quiet. She asked him again to let her out with the baby; and just as he said to be quiet, Baxter Griffin fired between her legs, down between her heels, on the floor.

Then Henry Harritt was behind me and pushed me toward the door. And he fell on his knees, and then somebody bolted the door down at the bottom, and someone turned out the light. And then we all started scrambling to try to get out the window. Just then I heard two more shots come through the door. (R. 10–11.)

Miss McCullough further testified that when petitioner fired the fatal shot he "was standing

right in the door, because he had a sight on everybody," and that he did not actually enter the apartment (R. 14). She further testified that the door to the apartment was closed when the "last two shots came through the door" (R. 11). She also stated that the deceased, when he was shot, was standing "next to the dresser and the oil stove, right in front of the door," that he had made no "move to leave where he was standing when he was shot," that he said nothing to petitioner just before he was shot, and that she saw nothing in his hand at the time (R. 11).

Miss McCullough was asked on cross-examination if it was not a fact that the deceased "had his hand in his pocket" when the shooting occurred; and she replied, "Yes, he had his hand in his pocket when he was standing up there by the dresser. * * * he was standing up there with his hand in his pocket and we were all laughing and talking" (R. 12–13). "That is the way he was standing," she explained, "when he was shot. He didn't have a chance to do anything. I don't guess he knowed what hit him" (R. 12).[2]

[2] A photograph of the body of the deceased, showing one hand in his pocket, was shown to this witness by defense counsel in connection with his cross-interrogation on this issue (R. 12) and also to other prosecution witnesses (R. 20, 23, 38). The photograph was subsequently introduced in evidence by the defense (R. 49–50) and was repeatedly referred to by defense counsel in his summation to the jury

Four other eyewitnesses to the shooting testified for the Government (R. 16–20, 21–22, 24–26, 27–30). Their testimony was in all material respects identical with that of Miss McCullough. They stated that there was no card game going on when the shooting occurred, and that, in fact, the game, whist, had ceased before petitioner left the premises following his exchange of words with the deceased concerning the latter's baby (R. 19, 21–22, 25–26, 28–29); that petitioner, after firing the fatal shot, fired four more times, including one shot directed at the feet of Esther Taylor, the deceased's wife, and two final shots from the hallway into the apartment through the door, which had meanwhile been slammed shut (R. 19, 22, 26, 30); and that petitioner, as he fired the fatal shot, uttered the remark, in substance, that he did not permit anybody to say he would kick his teeth out and get away with it (R. 19, 22, 26, 30). The only one of these other four witnesses who had any recollection as to the fact corroborated Miss McCullough's testimony that the deceased had one hand in his pocket when petitioner shot and killed him (R. 20; see R. 23, 31).

Sergeant Vogelson of the Metropolitan Police Department testified for the Government that he interviewed petitioner on the morning following

(R. 50–51, *passim*) as evidence corroborating petitioner's version of the shooting as an act of self defense (*infra*, pp. 8–9).

the homicide (R. 32–33). Petitioner told Vogelson that he and Hunter, the deceased, and two others were playing "blackjack" when the shooting occurred (R. 33). He, petitioner, according to his story to Vogelson, "was banking the game," and there was "eight dollars in the bank." Hunter, who was "playing a dollar," "hit a blackjack," but, "instead of claiming the dollar, that he was playing, from the bank, he claimed the entire eight dollars." When petitioner protested and sought to prevent Hunter from taking all the money in the "bank," Hunter told petitioner that "if he didn't like it, he would kick his teeth out," simultaneously rising to his feet and starting around the card table toward petitioner, "with his hand in his pocket." Petitioner thereupon shot Hunter. (R. 33–34.) Vogelson further testified that he asked petitioner whether Hunter "had any weapon in his hand at the time he fired this shot," and that petitioner replied, "no, he just had his hand in his pocket" (R. 34). Vogelson also testified that petitioner told him that he did not recall "firing more than one shot, * * * [as] he had been drinking" (R. 34). Petitioner also told Vogelson that, following the shooting, he "caught a cab and started to his brother's home in Alexandria, and on the way over, when they were crossing the 14th Street bridge, he threw the gun in the river" (R. 38, 34).

Vogelson further testified that in the course of his investigation of the homicide he examined the apartment where the fatal shooting occurred, and that "There were two bullet holes in the outside door. There were two bullet holes in the south wall of the room. There was one bullet hole in the floor, just inside the door." (R. 35). Photographs showing these bullet holes were received in evidence (R. 35–36). In response to a juror's question as to whether it could be determined from the bullet holes in the door whether "the bullets entered the door from the hall side of the door or from the room side of the door" (R. 36), Vogelson replied, "Apparently the bullets entered from the outside, because the outside hole was clean and the inside hole was ragged" (R. 37).

Petitioner testified at the trial in his own behalf and was the only defense witness (R. 39–43). On direct examination, he gave the same version of the shooting incident as he had previously given to Sergeant Vogelson on the day following the homicide (see pp. 6–7, *supra*), explaining that he shot the deceased when the latter "started around the table, with his hand in his pocket, and told me he would kick my teeth out of my head" (R. 39–40). Asked how he happened "to shoot two or three other times," he replied, "I don't know. I must have got nervous" (R. 40). He further testified that, after first fleeing to Virginia, he "decided not to run away,

and come back to my boss' house and told him about it, and he told me to go on up town, and I went back home, where he found the police waiting for him (R. 40).

On cross-examination, petitioner admitted that, as he was on his way to Virginia following the shooting, he threw the gun into the Potomac River from a taxicab, explaining that he "wanted to get rid of it" (R. 42). He was also asked whether he thought he "had a right to shoot this man if he was going to do something to you," to which he replied, "To defend myself, sure. He said he was going to kill me." His attention was then directed to the fact that he had said nothing on direct examination about a threat by the deceased to kill him, and he explained that "After he said he would kick my teeth out, he said he would kill me." (R. 42.)

The motion for a new trial on the ground of newly-discovered evidence, which gave rise to the instant proceeding, is not contained among the record papers, but the nature of the alleged new evidence relied on appears from two supporting affidavits executed by John M. Holzworth, an attorney retained by petitioner shortly before the filing of the motion (R. 67–68, 68–70). In the first of these affidavits, executed May 7, 1948, Holzworth stated that he had recently learned that "on the trial of the defendant the trial U. S. assistant Attorney Grace B. Stiles and Sergeant Vogelsang [*sic*] Washington Metropolitan police

officer in charge of the investigation of said murder, had in their possession evidence that the deceased Lee Hunter at the time of the killing had an open knife in his hand with which he was attacking or about to attack and assault the said Baxter Griffin," and that they "deliberately suppressed such vital evidence which would have substantiated the defendant's defense of self defense" (R. 67).

In the other affidavit, executed May 10, 1948, Holzworth stated that "in an interview with Charles Cornwell, a witness to the shooting and a witness on the trial of defendant, * * * said Cornwell stated that at the D. C. Morgue he saw a morgue employee turn over to Esther Taylor wife of Lee Hunter, deceased a purse and knife taken from the body of Hunter. That said employee said that the knife was open and in deceased [*sic*] hand when removed from his pocket. * * * That said Cornwell also stated that playing cards were scattered over the floor at the time of the shooting of Lee Hunter" (R. 68–69). The second affidavit also stated that officers Miller and Wyatt had told Holzworth that "playing cards were scattered over the floor" when they were at the scene shortly following the shooting (R. 69); that Joe Small, the morgue employee who removed the deceased's body, had told Holzworth that he "found the knife (black handled) in deceased's pocket" and that "playing cards were scattered over the floor of the room"

(R. 69); that Sergeant Vogelson had told Holzworth that "a knife was taken from Lee Hunter's body" (R. 69); that "the photografs [sic] taken by the police and in evidence on the trial do not show the scattered playing cards on the floor" (R. 69); and that "no mention was made [at the trial] of the knife on the deceased or in his hand or of the playng cards found scattered on the floor at time of the shooting" (R. 69). Such newly discovered evidence, the affidavit concluded, showed that evidence vital to the defendant's defense of self defense had been suppressed and that the government witnesses had perjured themselves (R. 70).

On May 21 and 25, 1948, a full hearing (R. 73–117) on the motion for a new trial was held before Judge Holtzoff, who had presided at the original trial (R. 3). The witnesses at the hearing were the six police officers (including those mentioned in Holzworth's affidavits) who were at the scene of the shooting within a short while after its occurrence (R. 81–83, 87–91, 92–95, 96–99, 100–101, 101–106, 106–108), the deputy coroner who examined the body at the scene (R. 91–92), Joseph Small, the morgue employee (R. 108–111), and Charles Cornwell, who was mentioned in Holzworth's second affidavit, and who was one of the eyewitnesses of the shooting (R. 111–112).

Small testified that when he arrived at the scene of the shooting the deceased's right hand was in

his pocket (R. 109), that he, Small, removed the hand from the pocket (R. 109), that the hand was grasping some playing cards at the time (R. 109), that some of these cards were dislodged from the deceased's hand when it was withdrawn and they fell on the floor (R. 110), that he saw no other cards scattered about anywhere—"Only what were scattered when his hand came out of his pocket, that was all" (R. 110); and that after removing the deceased's hand from his pocket, he put his own hand into the same pocket and found an open knife there (R. 109, 110).

Sergeant Vogelson corroborated the foregoing testimony, stating that "There were no cards on the floor until after the deceased's hand was removed from his pocket. At that time, some of the cards fell to the floor alongside his body" (R. 82). The bulk of the cards, however, "stayed in his hand" (R. 82). He described the knife that was found loose in the deceased's pocket as "a small black pen-knife that had originally been a two-bladed knife. One blade was broken off and that part of the blade was closed. The other blade was open" (R. 82).

The other police officers and the deputy coroner all corroborated the testimony of Small and Vogelson, the testimony as to whether or not cards were observed on the floor depending on the time the condition of the floor was noticed.

with relation to whether or not the deceased's hand had as yet been taken from his pocket (R. 91–92, 93, 94–95, 96–97, 100–101, 102–103, 106–108).

The witnesses' estimates as to the number of cards that were clasped in the deceased's hand when it was removed from his pocket varied from "just a few" (R. 92) to "a deck" (R. 82, 100). Small stated that there were "a good few cards" and possibly a deck (R. 110). Sergeant Embrey testified that "There did not appear to be 52 cards," but when asked if it was possible that there were "but five or six cards in his hand," he stated that "There were at least four times or five times that many" (R. 97).

Cornwell testified that he did not see any cards scattered on the floor at the time of the shooting, explaining that he had merely told Holzworth that he saw cards on the floor in some photographs of the scene taken after the shooting (R. 111–112).[1]

Petitioner himself did not testify at the hearing, nor was there any request that he be permitted to testify.

---

[1] Sergeant Voggelson testified that "The first picture was taken with the hand of the deceased in his pocket" and that "The second was taken after his hand was removed and was supposed to have shown the hand with the cards in it, but the photographer failed to catch that" (R. 90). The third photograph that was taken, however, which was a defense exhibit at the original trial, showed cards on the floor (R. 91).

Mrs. Stiles, the assistant United States Attorney who conducted the prosecution, made the following statement to the court (R. 84–85):

> I would like to state that the prosecution did know there was an open knife in the pocket of the deceased, but I took the position that there was no evidence in the case that this knife was ever taken [by the deceased] from his pocket. Even by the defendant's own testimony, he testified the deceased came around the table toward him with his hand in his pocket. The defense put in evidence the photograph which * * * showed this deceased with his hand in his pocket.
>
> I felt, just as Your Honor pointed out a while ago, if this fact of the knife had been raised it would not have been admissible. The man could have had a dozen knives in his pocket and unless it was shown that the defendant saw this knife or he was drawing out a knife or had a knife in his hand, that it would not have been admissible. That is the position I took. Certainly it was with no intention of suppressing any evidence which I felt was admissible.

The District Court denied the motion for a new trial (R. 71). In an oral opinion stating the reasons for the denial, the court (Judge Holtzoff) said (R. 115–116):

> The deceased was fatally shot by the Defendant. This is not denied. The Defendant contended, however, that he shot

in self-defense. Admittedly, there was a quarrel between the deceased and the Defendant. There is a dispute as to whether the quarrel was in the course of a card game or took place after a card game had been completed and concerned another subject.

The Defendant testified at the trial in his own behalf that the deceased made a menacing gesture, or what amounted to a menacing gesture, in the Defendant's direction. This gesture consisted of the deceased putting his right hand in his trousers pocket and coming in the direction of the Defendant.

It now appears that it is made on the basis for this application, that the deceased had an open pocket knife in his pocket at the time he made the menacing gesture. It does not appear, however, that he had withdrawn the knife from his pocket and it does not appear that the Defendant knew that the deceased carried an open pocket knife at the time. Moreover, the open pocket knife was not in the hands of the deceased, when the hand of the deceased was taken from his pocket. A number of playing cards was found in it and further search revealed the knife in his pocket, apparently lying loose.

The Court is unable to perceive that the presence of an open pocket knife in the pocket of the deceased has any bearing on the issues of this case.

The question is whether the Defendant shot in self-defense. All that he knew was that deceased made to the Defendant what seemed to be a menacing gesture; namely, that the deceased put his hand in his right-hand trousers pocket. Moreover, it appears affirmatively that the deceased did not grab the knife but had a number of playing cards in his pocket. The knife was lying in his pocket, loose.

The question whether a person is justified in attacking an assailant in self-defense must be determined by the facts which were presented to the person who pleads self-defense. He did not know, it appears, that the deceased had an open knife in his pocket, and therefore its existence is irrelevant.

The second basis for the motion is additional testimony tending to show that a number of playing cards were strewn on the floor of the room in which the shooting took place. Now witnesses produced in support of this contention were the same witnesses who testified at the trial,[1] so there is nothing newly discovered in that respect. Moreover, that is a circumstance which does not appear to the Court to be of any substantial importance. The fact that a

[1] This is not strictly accurate. Three of the witnesses at the hearing on the motion for a new trial—Sergeant Vogelson, deputy coroner Rosenberg, and Cornwell—testified at the trial, but the other witnesses at the hearing (Small and the police officers other than Vogelson) were not witnesses at the trial. We perceive no relevance in the point, however.

card game had taken place is not disputed. Whether it was still in progress or whether it had ceased is not very important, so far as the Court views the issues of this case. Moreover, the fact that there were cards on the floor would not necessarily establish that the game was still in progress.

The Court realizes the importance of the issue presented to it but verdicts of juries must not be lightly set aside. The Court feels that it would be acting improvidently if it granted a new trial on the basis of the facts here presented. The Court felt that these contentions should be examined exhaustively and this has been done.

Petitioner appealed from the denial of the motion, and on June 16, 1948, on motion of the Government (R. 117–121), the appeal was dismissed by the Court of Appeals, without opinion, in a *per curiam* order (R. 134).[1]

SUMMARY OF ARGUMENT

The granting of a motion for a new trial on the ground of after-discovered evidence is a matter of discretion, not reviewable except for manifest abuse. The district judge was warranted in finding that the new evidence relied on was not relevant and that, in any event, it could not, by any reasonable possibility, result in a different verdict.

[1] See also the Court of Appeals' *per curiam* opinion of July 19, 1948, dismissing petitioner's appeal from an order denying a petition for a writ of habeas corpus. *Griffin* v. *Clemmer*, 169 F. 2d 961.

One of the items of new evidence relied on—the alleged fact that playing cards were strewn on the floor when the shooting took place—was not proved at the hearing on the motion. In fact, the contrary was demonstrated. It was shown that the deceased was clasping playing cards in his pocket when he was shot, but that fact was consistent with the government witnesses' testimony and did not tend to substantiate petitioner's testimony that he shot in self-defense.

The other item of new evidence offered—the fact that petitioner had an open knife in his pocket when he was shot—was irrelevant. It is clear that petitioner, even according to his own testimony, neither knew of nor suspected the presence of the knife in the deceased's pocket. Accordingly, its existence could not possibly have been relevant to petitioner's claim of self-defense. Moreover, the testimony at the hearing on the motion showed that the deceased was not holding the knife; it was lying loose in his pocket.

It is unreasonable to suppose that a jury at a new trial, if presented with the new evidence now relied on, might reach a different verdict. The established facts that petitioner wantonly fired additional shots after the fatal one and that he guiltily disposed of the gun by throwing it into a river rendered his testimony that he shot in self-defense all but incredible. Furthermore, in order for a jury to credit petitioner's testimony at a new trial, it would have to find

that all five of the Government's eyewitnesses to the homicide, who gave highly detailed and substantially identical versions of the shooting which were diametrically opposed to petitioner's solitary testimony of self-defense, perjured themselves with full realization that they were sending an innocent man to his death. The remoteness of such a possibility could properly be considered in ruling on the motion for a new trial in this case.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR A NEW TRIAL

It is well settled that the granting or denial of a motion for a new trial on the ground of newly discovered evidence is a matter resting within the sound discretion of the trial court, and, in the absence of manifest abuse of such discretion, is not reviewable on appeal. *Helwig* v. *United States*, 162 F. 2d 837, 840 (C. A. 6); *Barber* v. *United States*, 142 F. 2d 805, 807 (C. A. 4), certiorari denied, 322 U. S. 741; *Long* v. *United States*, 139 F. 2d 652, 654 (C. A. 10); *Roberts* v. *United States*, 137 F. 2d 412, 416 (C. A. 4), certiorari denied, 320 U. S. 768; *Weiss* v. *United States*, 122 F. 2d 675, 691–692 (C. A. 5), certiorari denied, 314 U. S. 687; *Luke* v. *United States*, 84 F. 2d 711, 712 (C. A. 5), certiorari denied, 299 U. S. 542; *Joyce* v. *United States*, 294 Fed. 665, 668 (C. A. 9), certiorari denied, 264 U. S. 592; *Andrews* v. *United States*,

224 Fed. 418, 419 (C. A. 9); *Mitchell* v. *United States*, 196 Fed. 874, 878 (C. A. 9), certiorari denied, 226 U. S. 611. And in exercising its discretion, the trial court should be guided by the rule, among others, that the newly discovered evidence relied on must not only be material to the issues that were involved at the trial, but such that its consideration by a jury at a new trial would probably result in a different verdict. *Long* v. *United States*, *supra*, at 654; *Weiss* v. *United States*, *supra*, at 691; *Evans* v. *United States*, 122 F. 2d 461, 468–469 (C. A. 10), certiorari denied, 314 U. S. 698; *Wagner* v. *United States*, 118 F. 2d 801, 802 (C. A. 9), certiorari denied, 314 U. S. 622; *Prisament* v. *United States*, 96 F. 2d 865, 866 (C. A. 5); *Johnson* v. *United States*, 32 F. 2d 127, 130 (C. A. 8).[6] The cases,

[6] The states also uniformly so hold: *O'Pryor* v. *State*, 237 Ala. 13 (1938); *Flowers* v. *State*, 27 Ariz. 70, 81 (1924); *People* v. *Shepherd*, 14 Cal. App. 2d 513, 518 (1936); *Miller* v. *People*, 92 Colo. 481, 489 (1933); *Smith* v. *State*, 117 Fla. 458, 462 (1934); *Aiken* v. *State*, 176 Ga. 338 (1933); *People* v. *Harrison*, 359 Ill. 295, 300 (1935); *Sullivan* v. *State*, 212 Ind. 79, 82 (1937); *State* v. *Pavey*, 193 Iowa 985, 992 (1922); *State* v. *Jella*, 132 Kans. 509, 513 (1931); *Jeffords* v. *Commonwealth*, 281 Ky. 568, 571 (1940); *State* v. *Bradley*, 166 La. 1010, 1013 (1928); *State* v. *Dodge*, 124 Me. 243, 250 (1925); *People* v. *Prag*, 261 Mich. 686, 688 (1933); *State* v. *Bergeson*, 203 Minn. 88, 89 (1938); *Carraway* v. *State*, 167 Miss. 390, 402 (1933); *State* v. *Jennings*, 326 Mo. 1085, 1093–1094 (1930); *State* v. *Gangner*, 73 Mont. 187, 190–191 (1925); *Mathews* v. *State*, 111 Neb. 593, 605 (1924); *State* v. *Long*, 90 N. H. 103, 108 (1939); *State* v. *Quintana*, 30 N. M. 348, 353–354 (1924); *People* v. *Priori*, 164 N. Y. 459, 472 (1900); *Bridge* v. *State*, 20 Ohio Cir. Ct. (N. S.) 231, 233, affirmed,

Federal and State (see note 6), make no distinction, in applying this rule, on the basis of the seriousness of the particular crime involved. However, where the offense in question is of a serious type, and particularly in a capital case, we believe that the rule as stated may place too heavy a burden on the defendant who moves for a new trial on the ground of newly discovered evidence, and that the proper rule should be that the newly discovered evidence relied on must be such that there is a *reasonable possibility* that its consideration by a jury at a new trial would result in the return of a different verdict. In any event, we shall assume for purposes of this case the standard that is more favorable to the defendant.

We submit that the District Court's denial of the motion for a new trial in this case was a proper exercise of discretion.

The newly discovered evidence relied on consisted of (1) the alleged fact that playing cards were scattered about on the floor of the room when the fatal shooting occurred, and (2) the

87 Ohio St. 464 (1912); *McKissack* v. *State*, 61 Okla. Cr. 65, 71 (1937); *State* v. *Evans*, 98 Ore. 214, 223–224 (1920); *Commonwealth* v. *Russoniello*, 263 Pa. 93, 108 (1919); *State* v. *Jones*, 185 S. C. 274, 276 (1936); *State* v. *Loper*, 26 S. D. 151, 158 (1910); *Denran* v. *State*, 134 Tex. Cr. 433, 437–438 (1938); *State* v. *Hawkins*, 81 Utah 16, 30 (1932); *State* v. *Reynolds*, 96 Vt. 37 (1922); *Holbrook* v. *Commonwealth*, 165 Va. 700, 704 (1935); *State* v. *Adams*, 181 Wash. 222, 229–230 (1935); *State* v. *Beckner*, 118 W. Va. 430, 435–436 (1937).

fact that an open knife was found in the deceased's pocket when his body was examined. It was contended that if this evidence had been brought to the attention of the jury, it would have tended to substantiate petitioner's version of the shooting as an act of self-defense against a threatened assault resulting from a dispute over money in a card game, as against the diametrically different testimony of all five of the Government's eyewitnesses to the homicide that the shooting was an act of malice against the deceased for having used insulting language to petitioner in a quarrel which had nothing to do with a card game.

1. With respect, however, to the allegation that playing cards were scattered on the floor at or immediately following the time of the fatal shooting, it was overwhelmingly and without contradiction established at the hearing on the motion that such simply was not the fact. The only cards observed by anyone on the floor were a few which were dislodged from the deceased's hand, long after the shooting occurred, when his hand, clasped tightly about some cards, was removed from his pocket by the morgue employee. And the fact that the deceased had cards in his hand and his hand in his pocket when he was shot plainly did not tend to contradict the unanimous testimony of the Government's eyewitnesses at the trial concerning the circumstances surrounding the shooting. The Government's witnesses all agreed that a card game, whist, had been in progress some

time before the quarrel between petitioner and the deceased, which led to the shooting. Those who had taken any notice of the fact, moreover, testified that the deceased had his hand in his pocket when the fatal shot was fired. The fact that the deceased had picked up some of the cards used in the whist game and was holding them in his pocket when petitioner returned to the apartment and opened fire on him, therefore, was entirely consistent with the Government's witnesses' testimony. Nor did the fact that the deceased was holding cards in his pocket when he was shot tend to substantiate petitioner's solitary testimony that he shot in self-defense. For it is manifestly unlikely that a man who reaches into his pocket to draw a weapon would encumber his effort by retaining playing cards or anything else in his hand in the process.[7]

[7] Counsel for petitioner suggest the possibility that "Maybe the knife *was* in deceased's hand at the time he was shot, but *after* the shot he convulsively released the knife and grabbed the cards" and adds that "Certainly had the presence of the knife been made known to appellant's counsel at the time of trial such an argument would not have been too far fetched to make to a jury. And what judge can say that such an argument might not have created a reasonable doubt in the mind of at least one juror, or what judge can say that the jury might not have returned a verdict of second-degree murder or perhaps manslaughter" (Br. 8). We suppose that no argument is too far-fetched for an attorney representing a man accused of murder to make to the jury, but submit that counsel's present speculations miss the point involved in the issue before this Court. That issue is whether the district judge *abused his discretion* in denying the motion for a new trial. The fact that petitioner's present counsel

2. It is true that it was established at the hearing that the deceased, when he was shot, had an open pen-knife in the same pocket as that in which he was holding the playing cards. But the District Court was justified in considering that fact irrelevant to the question of whether petitioner's or the prosecution witnesses' testimony at the trial was the truth. In the first place, as the court pointed out, the deceased did not have his hand on the knife when the fatal shot was fired; on the contrary, it was lying loose in his pocket. And in the second place, as the court further observed, there was no evidence that petitioner knew the deceased had a knife in his pocket or even suspected the fact. Certainly, if he knew or believed that the deceased was thus armed, he would have so stated at the trial in aid of his testimony that he shot in self-defense. As we have noted, moreover, it was not until his cross examination that petitioner testified that the deceased threatened to kill him, his testimony on direct examination having been merely that the deceased threatened to "kick my teeth out." The significance of this discrepancy becomes clearer when it is recalled that petitioner, in telling his story to Sergeant Vogelson

---

or even a member of this Court might have ruled on the motion differently from the district judge is beside the point. We submit that the district judge's ruling—in effect, a determination that there was no reasonable possibility that the new evidence might produce a different verdict—was a reasonable exercise of discretion.

on the morning following the shooting, claimed merely that the deceased's threat was to kick his teeth out, and said not a word about a threat to kill him. In fact, as Voggelson testified, petitioner was specifically asked at that time whether the deceased had any weapon in his hand when he made the threat, and petitioner replied, "no, he just had his hand in his pocket." The conclusion is inescapable, therefore, that petitioner did not know, and never claimed to believe or suspect, that the deceased had a knife in his pocket at the time of the shooting. Its presence there was, as the District Court observed, an irrelevant fortuity so far as any issue at the trial was concerned, even if petitioner's version of the circumstances of the shooting was given credence by the jury, which it manifestly was not.

Furthermore, it is impossible to conclude that the new evidence relied on by petitioner might, by any reasonable possibility, result in a different verdict at a new trial. For it was established at the trial—and not denied by petitioner—that, after killing the deceased, petitioner recklessly and wantonly fired four additional shots, including one shot directed at the feet of the deceased's wife, and two parting shots into the apartment through a closed door. Petitioner, moreover, after the shooting admittedly disposed of the gun by throwing it into the Potomac River. This wanton additional shooting and the disposal of the gun in the manner stated were

obviously not the acts of an innocent man killing in self-defense, and these two facts rendered petitioner's testimony that he shot the deceased to save himself all but incredible. The absence of any reasonable possibility that a new trial would result in a different verdict is further emphasized by the fact that the jury at a new trial, in order to give credence to petitioner's version of the circumstances attending the shooting, would have to reject as perjurious the testimony of all five of the prosecution's eyewitnesses to the homicide. It must be remembered that this was not a case in which the testimony of the Government's witnesses agreed in most respects with that adduced by the defense, differing only in the interpretation of the homicide as necessary or unnecessary as an act of self-defense. The Government's witnesses gave a highly detailed and substantially identical account of the circumstances surrounding the homicide. Their version, utterly at variance with that of petitioner, showed the killing to have been a deliberately malicious act. Petitioner's version was, moreover, uncorroborated by anybody, notwithstanding the fact that the shooting was witnessed by numerous eyewitnesses, and obviously was prompted by self-interest. To reach the conclusion that a jury at a new trial might conceivably credit petitioner's story and reject that of the disinterested eyewitnesses, it would be necessary to assume that the jury might possibly

find that all five of those eyewitnesses deliberately perjured themselves, fully realizing that by so doing they were sending an innocent man to his death. Such a possibility is too remote to warrant the granting of a new trial on the basis of it.

For the reasons stated, we submit that the district judge's refusal to grant a new trial on the basis of the new evidence offered was a reasonable exercise of discretion, and should be upheld.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.
CHARLES B. MURRAY,
Assistant United States Attorney.

DECEMBER 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948